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No. 05-

IN THE

Supreme Court of the United States

NICHOLAS SARGENT, etc., *et al.*,

Petitioners,

v.

CITY OF TOLEDO POLICE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. MAY POLICE OFFICERS ENTER A HOME WHERE A LOUD PARTY IS IN PROGRESS WHERE NO OTHER INDICATION OF EXIGENT CIRCUMSTANCES IS PRESENT, AND WITHOUT EXERCISING THE OPPORTUNITY TO SEEK CONSENT OF ANY RESIDENT OF THE HOME?

II. IS AN OFFICER'S ENTRY INTO A HOME *PER SE* "REASONABLE" UNDER THE FOURTH AMENDMENT FOR THE SOLE REASON THAT ANOTHER OFFICER IS ALREADY INSIDE THAT HOME?

III. DOES A PARTY COMPLAINING OF A DEPRIVATION OF RIGHTS UNDER 42 U.S.C. § 1983 ALSO HAVE INDEPENDENT RIGHTS UNDER THE LAWS OF HIS OWN STATE?

LIST OF PARTIES

The Petitioners in this action are Mr. Nicholas Sargent, who brought this action individually and in his capacity as the representative of Mr. Donald Sargent, deceased. The Respondents are Officer Joseph Taylor of the City of Toledo Police Department, and the City of Toledo, Ohio.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINIONS OF THE COURTS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE PETITION	11
I. THE SIXTH CIRCUIT'S CASES HAVE FASHIONED AT LEAST TWO BROAD NEW EXCEPTIONS TO THE WARRANT REQUIREMENT	14

Contents

Page

A. EACH OFFICER WHO ENTERS A HOME MUST HAVE A WARRANT, CONSENT, OR EXIGENT CIRCUMSTANCES, AND A LOUD PARTY IS NOT, BY ITSELF, AN EXIGENT CIRCUMSTANCE 14

B. THE SIXTH CIRCUIT'S HOLDING THAT IS WAS NOT NECESSARY TO BALANCE PRIVACY INTERESTS AGAINST THE INTERESTS OF THE STATE IS PATENTLY INCORRECT 19

II. THE SIXTH CIRCUIT HAS ALSO ABANDONED ADHERENCE TO THIS COURT'S PRECEDENT DRAWING A BRIGHT LINE BETWEEN "COMMUNITY CARETAKING" AND THE INVESTIGATION OF CRIMES 22

III. ISSUES OF FACT REMAIN AS TO WHETHER OFFICER TAYLOR AND THE CITY OF TOLEDO ARE LIABLE UNDER OHIO STATUTORY LAW 23

IV. THIS CASE IS FACTUALLY UNIQUE 25

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Brigham City v. Stuart, 2005 UT 13, 122 P.3d 506 (Utah 2005), *cert. granted, Brigham City v. Stuart*, Case No. 05-502, 126 S. Ct. 979 (2006) 11, 12

Burr v. Hasbrouck Heights Police Dep't, 131 Fed. Appx. 799 (3d Cir. 2005) 17

California v. Greenwood, 486 U.S. 35 (1988) 23

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 23

Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002) 24

Fabrey v. McDonald Village Police Dept., 70 Ohio St. 3d 351 (1994) 24, 25

Georgia v. Randolph, 126 S. Ct. 1515 (2006) 12

Graham v. Connor, 490 U.S. 386 (1989) 21

Irving v. Austin, 138 Ohio App. 3d 552 (Lucas Ct. App. 2000) 25

Katz v. United States, 389 U.S. 347 (1961) 19, 20

Loria v. Gorman, 306 F.3d 1271 (2d Cir. 2002) 19

Cited Authorities

Page

Matkovich v. Penn Cent. Transp. Co., 69 Ohio St. 2d 210 (1982) 25

Mincey v. Arizona, 437 U.S. 385 (1978) 18, 21

Missouri v. Seibert, 542 U.S. 600 (2004) 26

Payton v. New York, 445 U.S. 573 (1980) 17

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 23-24

Sargent v. City of Toledo Police Dept., 150 Fed. Appx. 470 (6th Cir. 2005) 1

Silverman v. United States, 365 U.S. 505 (1961) ... 19

Smith v. Heath, 691 F.2d 220 (6th Cir. 1982) 14, 15, 16, 25

United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) .....*passim*

Welsh v. Wisconsin, 466 U.S. 740 (1984) 17

Cited Authorities

Page

Statutory and Constitutional Provisions:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 .....i, 1, 24

Ohio Revised Code § 2744.01, *et seq.* 10

Ohio Revised Code § 2744.03(A)(6)(b) 3, 24

U.S. Const. Amend. IV 2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Filed October 6, 2005 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of Ohio, Western Division Filed August 11, 2004 ..... 11a

Appendix C — Order Of The United States Court Of Appeals For The Sixth Circuit Denying Petition For Rehearing Filed February 7, 2006 ..... 26a

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Sargent v. City of Toledo Police Dept.*, 150 Fed. Appx. 470 (6th Cir. 2005). The Opinion of the United States District Court for the Northern District of Ohio in *Sargent v. City of Toledo Police Dept.*, Case No. 3:03CV7261, is unreported. These Opinions are attached as Appendices A and B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The opinion of the Sixth Circuit Court of Appeals was rendered on October 6, 2005. (Appx. A.) The Sixth Circuit's Order denying the Petitioner's Motion for Panel Rehearing and for Rehearing En Banc was entered on February 7, 2006. (Appx. C.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was brought under statutory authority of the United States, as well as of the State of Ohio. The federal law claims are made under 42 U.S.C. § 1983, which provides, in relevant part:

> § 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute . . . of any State or Territory or

> the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The issues on appeal specific to the Petitioners' § 1983 claim are brought under the Fourth Amendment of the United States Constitution, which provides:

> Unreasonable searches and seizures.
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Petitioners have also separately pled and appealed claims under the statutory law of the State of Ohio. The Ohio Political Subdivision Tort Liability Act provides, in relevant part, as follows:

> (A) In a civil action brought against a political subdivision or an employee of

> a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> * * *
>
> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, **the employee [of a political subdivision] is immune from liability unless one of the following applies:**
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, **or in a wanton or reckless manner**. . . . [Emphasis added.]

Ohio Revised Code (R.C.) 2744.03(A)(6)(b).

STATEMENT OF THE CASE

This case concerns the shooting death of a young man by an officer of the Toledo, Ohio Police Department. The shooting occurred no more than thirty seconds after Respondent Joseph Taylor entered Donald Sargent's home with no warrant, and without consent. The only claimed

"exigent circumstance" was a noise disturbance call placed by a neighbor of the decedent a few minutes before. The first Toledo police officer to enter the home crossed the threshold at the same moment as he first addressed the decedent, without making any effort to obtain Mr. Sargent's consent. The only suspected crime in progress at that moment was the noise disturbance, and possibly underage drinking, both of which are misdemeanors under Ohio law.

Officers Joseph Taylor (Respondent) and Douglas Whatmore arrived at the decedent's home at about one o'clock in the morning of April 20, 2002 in response to a noise disturbance call. The officers were at the Sargents' home less than four minutes before Officer Taylor mortally wounded Donald Sargent. While Officer Whatmore had some prior experience as a police officer, it was third day of line duty with the Toledo P.D. Officer Taylor was serving as the training officer for Officer Whatmore at the time.

Upon arrival at the decedent's home, the officers first tried the front door. When no one responded, they went toward the back of the house. Officer Whatmore arrived at the back door first because Officer Taylor paused in the driveway briefly to look up at the second floor of the house, where he had heard a "commotion" he described as "Banging, clanking around." He estimated the length of this pause at 10 seconds.

Unlike at the front door, Officer Whatmore encountered Donald Sargent at the back door:

Q. So what did you do?

Q. What I did is I walked up, I peeked my head in and I spotted who we now know is Donnie Sargent.

I said: What's going on here? And at that point, when I poked my head in, I stepped in and I saw him and I asked him his name. While I was talking to him, approximately 10 to 15 seconds after I was talking to him, Joe Taylor walks in.

Q. Let's go over that. First of all, at the time you entered the home, did Mr. Sargent invite you into the house.

Q. No.

Q. Did anyone invite you into the house?

A. No.

Q. Were you able to get his attention or spot him before you entered the house?

A. Yeah. I spotted him when I looked in.

Q. Did you start the conversation at that point?

A. I said: What's going on here?

Q. Did he respond to you before you entered the house?

A. No. He looked at me and I stepped in and asked him what his name was and he said: Donnie.

(JA 265-267.) Officer Taylor followed Officer Whatmore into the house an estimated 10 to 15 seconds later. Officer Whatmore indicated that Officer Taylor had joined him in the kitchen by the time Mr. Sargent said his name.

Mr. Sargent was not cooperative with the two officers who had entered his home. Both Officers Taylor and Whatmore vaguely described the decedent as acting strangely. Officer Taylor's deposition goes farther to describe Mr. Sargent as being "belligerent." The one word recalled by Officer Taylor is "bullshit." Officer Whatmore recalls the decedent protesting the officers' presence. ("What are you doing here", JA 269; *see also* Taylor Dep. at 50, "We're not doing nothing in here and that kind of thing", JA 340.) It is undisputed that the officers were standing in Mr. Sargent's kitchen, blocking the door. They did not have a warrant, nor consent. Neither officer announced his entry nor his purpose for coming in. Instead, Officers Whatmore and Taylor only demanded that Mr. Sargent identify himself.

Mr. Sargent checked his person for ID, then took a couple steps away from the officers. Officer Taylor immediately followed:

> A. He said – he padded himself, took a couple steps and said: I don't have it. It's upstairs, and he took a couple steps. I said: No, no. Don't worry about it. He said: I'll go get it. I said Don't worry about it, and I had taken a couple steps with him because I had a pretty good idea what he was going to do from past experience.

(JA 309.) Officer Taylor's later testimony made it clear that he did not mean he had past experience with Mr. Sargent.

Mr. Sargent tried to move away from the officers, Officer Taylor moved toward Mr. Sargent and told him not to leave, and Mr. Sargent fled. Officer Taylor remained a few steps behind the decedent until the top of the stairs, and glimpsed

the decedent as he slammed his bedroom door. Officer Taylor did not survey the floor for bystanders, notwithstanding the fact that he paused in the driveway *one minute* previously to observe noises upstairs. He did not call for support. He did not check the location of his partner. He did not call to Mr. Sargent in any way, neither to indicate his intent to arrest him, nor to attempt to establish a dialog, nor to warn Mr. Sargent or anyone else behind the door of his entry. "I drew my weapon and kept running."

Q. The door closes when you're eight feet away, you draw your weapon and you say you keep running but you're approximately two to three steps from the door at that point?

A. Probably.

Q. What do you do then; do you try the door?

A. Nope.

(JA 313.) Officer Taylor testified that he gave no more verbal commands or warnings before firing the shot that killed Donald Sargent:

Q. Any type of verbal command?

A. Yes. When I was chasing him, I was yelling at him to stop as we ran through the house and up the stairs, but once he ran in there, that was it.

Q. Once the door was closed, there was no more verbal commands from you?

A. No.

Q. When you kicked the door, did you shout a verbal command before entering the doorway?

A. No.

Q. Did you shout any verbal commands before discharging your weapon?

A. No. [Emphasis added.]

(JA 314.)

Officer Taylor kicked through the center panel of the door "with [his] gun at the ready." (JA 314.) He did so without any reason to believe that any felony was transpiring on the other side of the door, by his own admission. He did not believe anyone's life was in danger. He was not thinking that Mr. Sargent would escape out a window. He did not *see* any of the other three occupants in the room. The time from his entry to the time he fired the shot was "maybe half a second, a second at most probably." (JA 319.) Officer Taylor discharged one shot, killing Donald Sargent.

Officer Taylor's sole justification for kicking down the door without hesitating is:

A. I was only a few steps behind him and I felt that if I waited the element of surprise is better to stay on the suspect and to stop him from either getting rid of drugs, pulling a weapon, things like that.

(JA 332-333.) Respondent had no knowledge of any drugs or weapons. Mr. Sargent was suspected only of underage

drinking at a loud party. Officer Taylor was aware that these offenses are misdemeanors.

Upon entry into the decedent's room, Officer Taylor perceived the decedent standing up from a crouched position and turning to the decedent's left toward Officer Taylor. Mr. Sargent was "coming out from between these mattresses." (JA 345.) Officer Taylor stated that when Mr. Sargent turned, he was holding the gun in his right hand and pointing it "at" Officer Taylor "in [his] opinion." (JA 315-316.) Officer Taylor estimated the total time from his entry into the kitchen to his firing the shot at "Fifteen to 30 seconds." (JA 346.)

Officer Taylor's testimony does not indicate that he considered the possibility that Mr. Sargent ran because two armed officers had just entered his house with neither a warrant nor his consent. Officer Whatmore testified that he had not drawn his weapon until Officer Taylor ordered him to do so after the shooting. He did not feel the circumstances warranted drawing his weapon. Officer Whatmore testified that at no point did the decedent physically demonstrate any threat that put Officer Whatmore in fear of his own life.

A witness to the shooting testified as to how the decedent came to be carrying the gun. (Deposition of JAmes P. Hogan, JA 359.) Another of the attendees inadvertently opened an old cash register Mr. Sargent kept in his bedroom. Mr. Sargent rushed to the open drawer to get a .22 caliber pistol, in an apparent attempt to keep the gun safely away from his guest. This occurred about an hour before the shooting. This is the gun Mr. Sargent was attempting to stash under his mattress when Officer Taylor burst through his bedroom door.

For reasons that can never be known, as Officer Taylor was breaking through his door, Mr. Sargent hesitated before putting the gun under the mattress. It appears Mr. Sargent froze. Mr. Hogan's testimony directly contradicts that of Officer Taylor as to the posture of the gun Mr. Sargent was holding:

> A. *** The gun was never raised, he kept it at his side. I mean, Donny is not stupid, you don't –
>
> Q. Let me ask this.
>
> A. –point guns at cops.

(JA 385.) The Respondent's embellishments in the courts below that Mr. Sargent was "brandishing" the gun are hyperbolic at best.

After the shooting, Mr. Hogan and the two remaining occupants of the room were ordered to the floor. Officer Taylor pointed at Mr. Hogan. Mr. Hogan's account indicates in three places that Mr. Sargent's last words were protests against the officers' entry into his home. (JA 389, 391, 392.)

The Petitioners claims were originally brought in a court of the State of Ohio, then removed to the United States District Court of the Northern District of Ohio. Respondents sought summary judgment on all claims. The Petitioners' opposition focused on two main legal avenues for holding Officer Taylor and the City of Toledo liable: the Fourth Amendment claims brought under § 1983 and the United States Constitution, and the Ohio Political Subdivision Tort Liability Act, R.C. 2744.01 *et seq.* Both the District Court and the Court of Appeals found that reasonable minds could

not differ as to the Respondent's liability under either governing standard. Jurisdiction of the Sixth Circuit Court of Appeals was proper under 28 USCS § 1291.

REASONS FOR ALLOWANCE OF THE PETITION

It is now the law in the Sixth Circuit that if you are hosting a loud party, the police are invited to join you without your express invitation. It is now the law in the Sixth Circuit that if the police come to break up your loud party, they may enter without your permission, even if no other crime is suspected, and even if they *see* you standing near the threshold of your home. And most alarmingly, it is now the law in the Sixth Circuit that whether or not the first police officer to enter your home violated the Fourth Amendment when he or she did so, *any subsequent officer who wishes* is free to come in too. These propositions do not reflect this Court's jurisprudence regarding the Fourth Amendment, but nevertheless, they are now the law in the Sixth Circuit. This Court must accept jurisdiction in this case in order to bring the developing law of warrantless entry in the Sixth Circuit back in line with this Court's precedents.

There is no question that the issues in this case concern matters of critically important precedential value because this Court has recently heard at least two cases involving very closely related issues. First, this Court recently heard oral argument in *Brigham City v. Stuart*, 2005 UT 13, 122 P.3d 506 (Utah 2005), *cert. granted*, *Brigham City v. Stuart*, Case No. 05-502, 126 S. Ct. 979 (2006). *Brigham City* also concerns a warrantless entry to the site of a loud party following a noise disturbance call. It has been widely reported that at oral argument of that case, this Court appeared

to accept the notion that the host of a loud party forfeits certain rights to be free from police intrusion, at least to some extent, that are otherwise recognized. Especially if that is so, the instant case presents an invaluable opportunity to clearly define the developing law of exigent circumstances. In *Brigham City*, the police entered immediately upon observing a fight inside the home. This case has many facial similarities to *Brigham City*, but a few very important differences. Namely, in this case the first officer to enter the home simply forewent the opportunity to get consent. This Court has never held that a loud party, with nothing more, is an "exigency," but that is precisely the action taken by the Sixth Circuit. Alongside *Brigham City*, this case gives this Court the opportunity to announce very clear guidelines about when a warrantless police entry into a loud party is, and is not, justified.

The second very recent entry case is *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), decided about six weeks ago. In that case, the respondent's estranged wife gave police permission to search the marital residence, even though the respondent had denied permission. The fact that both *Randolph* and *Brigham City* have come before this Court in the same term highlights the necessity to announce clear rules surrounding the warrantless entry into citizens' homes.

Moreover, future police defendants will seek shelter under the "tip of the spear" holding, that any police officer can just walk right into a private home so long as there is already another officer inside, even if that first officer entered illegally, and even if the second officer to enter is supposed to be supervising the first. Absolutely no precedent of this Court supports this holding of the Sixth Circuit. In fact, the

court of appeals disregarded one of its own directly applicable precedents to reach this holding. Further, the "first officer/ second officer" factual aspect to this case is surprisingly unique. To the Petitioner's knowledge, the Sixth Circuit may be the only federal court of appeals to consider this issue. It has done so twice, with conflicting results.

This case also involves a critically important issue of federalism. In the opinion of October 6, 2005, the importance of the Petitioners' claims pled under Ohio statutory and constitutional law were literally reduced to one footnote. (*See* Appx. 9a, n. 2.) The Sixth Circuit did not give adequate consideration to an issue that is every bit as important as the decedent's rights under the federal Constitution: whether the evidence showed that reasonable minds could disagree as to whether officer Taylor's actions were "reckless" within the meaning of the governing Ohio statute.

This case is about an illegal police entry into a citizen's home, that citizen's justifiable resistance to that entry, and the police's shooting of that citizen as little as *fifteen seconds* later. The fact that an underage drinking party is in progress does not give the police licence to enter without a warrant. Underage drinking is a misdemeanor. Neither police officer even believed himself to be threatened. If left to stand, the court of appeals's holding in this case will make every citizen in the Sixth Circuit substantially less protected from police overreaching at the very place most stringently protected by the Fourth Amendment: the home.

I. THE SIXTH CIRCUIT'S CASES HAVE FASHIONED AT LEAST TWO BROAD NEW EXCEPTIONS TO THE WARRANT REQUIREMENT.

A. EACH OFFICER WHO ENTERS A HOME MUST HAVE A WARRANT, CONSENT, OR EXIGENT CIRCUMSTANCES, AND A LOUD PARTY IS NOT, BY ITSELF, AN EXIGENT CIRCUMSTANCE.

It is important to consider that in deciding this case, the Sixth Circuit abandoned a well-founded rule announced in one of its own earlier cases, *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982). In *Smith*, a patrolman followed the plaintiff into his motel apartment, where he lived with other members of his family. *Smith*, 691 F.2d at 221. The plaintiff had apparently refused to submit to detention at a traffic stop that occurred just outside. *Id.* The patrolman kicked through the door, stalked into an interior room and opened fire, all without explanation. The patrolman, however, did not appeal the verdict against him.

The Appellant in *Smith* was his supervisor, Detective Rohtert, who sought reversal of the verdict apportioning damages to him. *Id.* Rohtert arrived some time later, after several other officers were already inside. *Id.* at 222. It was undisputed that none of the officers obtained a warrant, nor consent to enter. *Id.* Speaking specifically of Rohtert's entry, The court of appeals stated:

> **It makes no difference that other officers arrived before Rohtert and entered unlawfully. Rohtert is liable for his unlawful entry, which was not**

> **made lawful by the prior unlawful entry of the others.** [Emphasis added.]

Smith, 691 F.2d at 225. The Petitioners called *Smith* to the court of appeals's attention, and the court of appeals even cited *Smith*. (Appx. A at 6.) It is difficult to imagine a factual pattern and a case holding more directly on point. There can be no question that Officer Taylor's entry is not made per se "reasonable" by the mere fact that another officer was already inside the home. As The court of appeals stated in *Smith*:

> The dissent terms it "almost unbelievable" that Rohtert should be found liable for an unlawful entry and search and seizure, when he did not order the presence of the other officers at the apartment. The district court found that Rohtert entered the apartment unlawfully. *** It makes no difference that other officers arrived before Rohtert and entered unlawfully. Rohtert is liable for his unlawful entry, which was not made lawful by the prior unlawful entry of the others.

Smith v. Heath, 691 F.2d 220, 224-225 (6th Cir. 1982). In this case, Officer Taylor also testified as follows that "I intervened at that point [when the Decedent became angry] because my partner is a probationary officer. . . ." (JA 308, lines 20-22.) After the shooting, all parties testified that Officer Taylor ordered Officer Whatmore to draw his weapon. They ordered everyone left on the second floor of the Sargent house to the floor, then took several into custody for

questioning. They then seized other weapons in the home without cause, and never returned them.

It is abundantly clear in *Smith* that a later-arriving officer is liable for his own conduct, directly, so long as that officer directs or participates in the police conduct that occurs after his arrival. In this case, Officer Taylor could not even claim that his arrival was in any distal way separated from Officer Whatmore's. The decedent expressed a better grasp of the Fourth Amendment warrant requirement than shown by Officers Whatmore and Taylor when he shouted that "you can't just come into my house." Yes, Donnie was irate–so too would James Madison have been.

This Court has been perfectly clear, as repeated here by the Sixth Circuit:

> [S]earches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). . . . In stating this general rule, the *Payton* Court found that the "**physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,**" and reasoned that "the warrant procedure minimizes the danger of needless intrusions of that sort." 445 U.S. at 585-86 (*quoting United States v. United States District Court*, 407 U.S. 297, 313 (1972)). [Emphasis added.]

United States v. Rohrig, 98 F.3d 1506, 1513 (6th Cir. 1996). "The Fourth Amendment has drawn a firm line at the entrance

to the house." *Payton v. New York*, 445 U.S. 573, 590 (1980). There is no brighter line in American constitutional law:

> [E]xceptions to the warrant requirement are few in number and carefully delineated and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.

Welsh v. Wisconsin, 466 U.S. 740, 749-750 (1984).

The court of appeals' earlier opinion in *Rohrig* also concerned issues closely related to those in this case. But in that case, the court of appeals showed some respect and deference for these well established principles. Nevertheless, *Rohrig* has met with caution in other jurisdictions. *See, e.g., Burr v. Hasbrouck Heights Police Dep't*, 131 Fed. Appx. 799, 802 (3d Cir. 2005)("None of our sister courts of appeals has followed *Rohrig* in a published opinion. . . .") Petitioner submits that this developing line of case law that is unique to the Sixth Circuit has placed that jurisdiction at odds with the rules established by this Court.

In *Rohrig*, the court of appeals was careful to note that the officers tried the front door of the house; then they tried the back door; then they announced themselves every time they entered a new room. *Rohrig*, 98 F.3d at 1508-1509. In this case, Officer Whatmore did not even try to get consent before entering. Officer Taylor knew from the moment of his entry that the person he was talking to was the host of the party. He took charge, but never took care to ensure that his presence was lawful, or even to state his purpose.

Warrantless entry into the home is "the chief evil" the Fourth Amendment protects against–but after October 6, 2005, in the Sixth Circuit, as long as one officer has already perpetrated that evil, any of his partners may. The Petitioners believe that the danger to citizens' rights to be secure in their homes that will be wrought by the court of appeals's unqualified holding is difficult to overstate. This Court should hear this case now, while the Sargent family can still be served, rather than rehearing it after the police have come to rely on the Opinion of October 6, 2005.

Rohrig presents itself as a narrow exception to the warrant requirement; this case does not. This case's categorical statement that any other officer may follow a prior entry is absolutely inconsistent with this Court's authority:

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. *Cf. Coolidge v. New Hampshire*, *supra*, at 481. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey v. Arizona, 437 U.S. 385, 393 (1978).

Rohrig and this case are nothing less that the creation of a "new exigency," as stated by the Sixth Circuit in *Rohrig*. 98 F.3d at 1519. But as well stated by the Second Circuit Court of Appeals:

> **No invasion of the sanctity of the home can be dismissed as de minimis.** "'A sane, decent, civilized society must provide some . . . oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.'"

Loria v. Gorman, 306 F.3d 1271, 1284 (2d Cir. 2002), *quoting* *Silverman v. United States*, 365 U.S. 505, 511 n.4 (1961).

In contrast, it is now the law in the Sixth Circuit that it is objectively reasonable for any police officer to enter a home so long as at least one other officer is already inside. It does not matter that the first entry is unlawful. It does not matter if the later officer is supervising the first. Whether this Court reviews the "tip of the spear" holding now or later, Petitioner submits that this issue will recur until it is addressed.

B. THE SIXTH CIRCUIT'S HOLDING THAT IS WAS NOT NECESSARY TO BALANCE PRIVACY INTERESTS AGAINST THE INTERESTS OF THE STATE IS PATENTLY INCORRECT.

While discussing *Rohrig*, the court of appeals recalled its own earlier discussion in that case of *Katz v. United States*, 389 U.S. 347 (1961). The point in *Rohrig* was that if one

falls asleep with the stereo blaring, if the neighbors are complaining, one has invited the police into the home to quiet the noise. In the well known language of *Katz*, that is to say that one's "reasonable expectation of privacy" is diminished under those circumstances. In the *Katz* formulation, the interests of the community are balanced against those of the individual.

The holding of this case rests on the most troubling statement that:

> **Undertaking such an examination is unnecessary here**, however, because we need not rest our conclusion that Taylor did not commit a Fourth Amendment violation on the exigent circumstances exception, finding as we do that no Fourth Amendment violation occurs when an officer follows a partner inside after the partner has already entered the home. [Emphasis added.]

(Appx. A, at 6.) With this statement, this case's holding reaches well beyond that of any other case. Not only are there no limitations on police entry once one officer is inside, but all subsequent entries are "reasonable" without regard to the circumstances of the initial entry. This aspect of this Court's holding will also breed endless litigation if not reviewed now.

Numerous decisions of this Court have directed the opposite:

> But a warrantless search must be "strictly circumscribed by the exigencies

> which justify its initiation," *Terry v. Ohio*, 392 U.S., at 25-26, and it simply cannot be contended that this search was justified by any emergency threatening life or limb.

Mincey v. Arizona, 437 U.S. 385, 393 (1978). The principle applies not only to a contested entry, but also to the application of force:

> Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.

Graham v. Connor, 490 U.S. 386, 388 (1989). Donnie's last words made it clear that he subjectively expected the police not to enter without a warrant, without consent, and without so much as a knock. As a matter of law, whether his expectation was reasonable is not a close call: it is well established that the police cannot simply walk in. In this case, the lower courts allowed the fact that one officer was already inside to trump every other Fourth Amendment principle. The Respondents had no justification for entering without consent.

II. THE SIXTH CIRCUIT HAS ALSO ABANDONED ADHERENCE TO THIS COURT'S PRECEDENT DRAWING A BRIGHT LINE BETWEEN "COMMUNITY CARETAKING" AND THE INVESTIGATION OF CRIMES.

The Sixth Circuit's "loud party" cases have their roots in the "community caretaking" doctrine:

> However, we believe that the Welsh analysis [government interest is proportional to the severity of the offense] has less relevance as one moves away from traditional law enforcement functions and toward what the Supreme Court has referred to as "community caretaking functions." *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706 (1973); *see also United States v. Johnson*, 9 F.3d 506, 510 (6th Cir. 1993), *cert. denied*, 129 L. Ed. 2d 821, 114 S. Ct. 2690 (1994).

Rohrig, 98 F.3d at 1521. But the court of appeals failed to acknowledge that this Court has made it clear that "community caretaking functions" as those which are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

It is admitted on the record before this Court that at least part of Officers Whatmore and Taylor's motives were to investigate misdemeanors in progress. The court of appeals

refused to clarify the effect of *Rohrig*'s blending of "community caretaking" law with the law governing "exigent circumstances." Certainly this precedent is not rendered irrelevant by the mere holding that it is categorically "reasonable" to enter a home once one's partner–or trainee–is already inside.

III. ISSUES OF FACT REMAIN AS TO WHETHER OFFICER TAYLOR AND THE CITY OF TOLEDO ARE LIABLE UNDER OHIO STATUTORY LAW.

The statutory law of a State represents the will of the people of that State. The people are free to enact statutory or constitutional protections that reach beyond the Constitutional minimums of the United States Constitution. Despite every call to give Ohio law the attention required, the Sixth Circuit reduced its discussion of the Ohio Political Subdivision Tort Liability Act to a *single footnote*.

The court's cursory treatment of the Petitioners' Ohio law claims conflicts with this Court's frequent assertion that states are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982)(". . . [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S.

74, 81 (1980). It is axiomatic that in its exercise of supplemental jurisdiction over state law claims, the federal courts are bound to hold as they believe the Ohio Supreme Court would. The Ohio Supreme Court would not reduce the operation of the Ohio Political Subdivision Tort Liability Act to a footnote.

The Court of Appeals has given proper considerations to Ohio law in police violence occasions in other cases. *See, e.g., Ewolski v. City of Brunswick*, 287 F.3d 492, 517 (6th Cir. 2002). In a departure from the approach of the *Ewolski*. Court, in this case, the court below did not even address the meaning of the term "reckless" in Ohio Revised Code § 2744.03(A)(6)(b), as defined by the Ohio Supreme Court. Further, whether an actor is "reckless" under Ohio law is generally not a question of law, but a question of fact for the jury. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994).

This case therefore presents a critical issue of federalism. The Petitioners' Complaint was properly pled and filed in an Ohio Court, citing rights under the federal Constitution, as well as those under Ohio statutes. The holdings of the District Court and of the court of appeals have all but rendered a law of the State of Ohio superfluous to the rights granted separately under 42 U.S.C. § 1983.

It is undisputed that neither the City of Toledo nor Officer Joseph Taylor enjoy immunity under Ohio law if Officer Taylor acted "recklessly." R.C. 2744.03(A)(6)(b). Officer Taylor let a call to quiet down a loud party escalate into a fatal shooting in less than 30 seconds. With reason to know young people were inside, he ran all out through a private home with his gun at the ready, for the sole purpose of

maintaining the element of surprise. The lower Court's cursory treatment of a statute enacted by the people of Ohio has caused all of the Petitioners' rights under the laws of their own state to simply vanish.

Ohio follows the general rule that the **determination of whether an action was reckless is a question for the *jury***. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994); *Matkovich v. Penn Cent. Transp. Co.*, 69 Ohio St.2d 210, 214 (1982); *Irving v. Austin*, 138 Ohio App. 3d 552, 556 (Lucas Ct. App. 2000). Reasonable minds can view Officer Taylor's deposition testimony and disagree as to whether his recklessness caused Donnie Sargent's death.

IV. THIS CASE IS FACTUALLY UNIQUE.

Even though there are thousands of cases construing the Fourth Amendment, this case presents two unique factual aspects, about which there is little or no existing case law. First, the Appellants' research has yet to uncover a single case in any jurisdiction in which a police foot chase of a suspect actually began within the suspect's own home. Second, the Appellants have only discovered one prior case directly addressing the central holding of this case, that a second officer may join a policeman who is inside a home without regard for the legality of the first officer's entry, and regardless of whether the second officer is supervising the first. That prior case is *Smith v. Heath*, 691 F.2d 220, 224-225 (6th Cir. 1982), in which this Court held directly to the contrary of its holding in this case. In addition to the reasons stated above, this case therefore presents a unique opportunity to provide guidance.

CONCLUSION

This Court has observed that the police are adept at modifying their tactics to go to the limit of what has been allowed by Fourth Amendment jurisprudence:

> Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may [elicit confessions through the now discarded 'knock and talk' technique.]" Police Law Institute, Illinois Police Law Manual 83 (Jan. 2001-Dec. 2003), [cite omitted] n2. **The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.**

Missouri v. Seibert, 542 U.S. 600, 609 (2004). If this Court will not review this case now, next year's "Police Law Institute Manual" will advise that there is no need to consider the Fourth Amendment so long as one officer is already inside the home.

Petitioners wish not to be mistaken for suggesting that the police should not be aggressive in their duties. On the contrary, only criminals want the police *not* to be aggressive. For that reason, the police can and must go to the limits of what the Constitution allows as part of their duty to protect the public. Thus, it is especially important that case law leave no room for mistake, and announce clear principles for the benefit of the police and citizens alike.

In this case, the holdings announced by the Sixth Circuit have enormous potential to confuse the police and to result in the deprivation of citizens' rights, until this Court intervenes. Petitioners request this Court to grant certiorari while the Sargent family may yet receive the benefit.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 6, 2005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-4143

NICHOLAS SARGENT, individually and as administrator for the estate of DONALD J. SARGENT,

Plaintiff-Appellant,

v.

CITY OF TOLEDO POLICE DEPARTMENT, and JOSEPH TAYLOR, City of Toledo Police Department,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: SILER and DAUGHTREY, Circuit Judges; MARBLEY, District Judge.*

SILER, Circuit Judge. Plaintiff Nicholas Sargent, individually and as administrator of the estate of Donald J. Sargent, instituted proceedings pursuant to 42 U.S.C. § 1983 against defendants for alleged violations of decedent's Fourth

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Amendment rights. The district court granted summary judgment in favor of all defendants, finding that no Fourth Amendment violation occurred, that Toledo Police Officer Joseph Taylor was protected by qualified immunity, and that the plaintiff did not properly plead a § 1983 claim against the Toledo Police Department. For the following reasons, we **AFFIRM.**

I.

In 2002, Toledo, Ohio police officers Taylor and Douglas Whatmore responded to a 911 call made by a neighbor of Donald J. Sargent that complained of a loud party and noise disturbance at Sargent's home. When Taylor and Whatmore arrived at the residence, they knocked on the front door at least twice, attempting to locate the owner. From their position, they could see juveniles sitting on the front porch and a young person "passed out" in the rear seat of a car parked in the driveway; they could hear a loud commotion and voices shouting inside the house. Whatmore proceeded to the back of the house, where he saw a number of juveniles running from the residence. He approached the back door, which was open, and peeked his head into the house, where he encountered Sargent alone in the kitchen. Whatmore asked Sargent what was going on and stepped inside. At that time, Taylor finished investigating the noises in the front of the house and walked to the rear of the residence to locate Whatmore. Finding Whatmore inside talking to Sargent, Taylor also entered the home.

Taylor asked Sargent for his identification. Sargent became irate. He informed the officers that he would go

upstairs and locate his identification; Taylor told him not to leave to procure the identification. Sargent ignored Taylor's instruction and bolted out of the kitchen. Taylor and Whatmore immediately gave chase.

During the pursuit, Taylor commanded Sargent to stop. Sargent did not stop but continued running through the living room, up a flight of stairs, and down a hallway into a bedroom. He slammed the bedroom door shut behind him. Taylor approached the bedroom door and kicked the center panel into the room.

After Taylor kicked the door, he observed Sargent getting up from a crouched position near the bed, as if he had been looking for something between the mattress and the box spring. Sargent then turned to Taylor, holding a gun in one hand. In response, Taylor shot once at Sargent, killing him.

Sargent's estate instituted proceedings under 42 U.S.C. § 1983 against the City of Toledo Police Department and Taylor for violations of decedent Sargent's Fourth Amendment rights. The district court granted summary judgment in favor of all defendants on grounds that no Fourth Amendment violation occurred, Officer Taylor was protected by qualified immunity, and Sargent failed to properly plead a § 1983 action against the Police Department.

II.

We review a grant of summary judgment *de novo*. *Farhat v. Jopke*, 370 F.3d 580, 587 (6th Cir. 2004). Summary judgment is appropriate when the evidence presents no

genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

We address Sargent's claims first with respect to Taylor, and second with respect to the City of Toledo Police Department. Sargent argues that Taylor violated Sargent's Fourth Amendment rights and therefore cannot claim the protection of immunity. Because the question of whether Taylor may claim qualified immunity necessarily turns on whether Taylor committed a constitutional violation, we analyze the two claims together. This court has recently approved the following two-step inquiry to determine if qualified immunity is available: (1) whether the facts, taken in the light most favorable to the plaintiff, sufficiently establish a violation of a constitutional right; and (2) if the facts do suggest a violation, whether the right at issue was clearly established. *Greene v. Barber,* 310 F.3d 889, 893 (6th Cir. 2002) (citing *Saucier v. Katz,* 533 U.S. 194, 201-02 (2001)).

A.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, guarantees that the "right of the people to be secure in their persons, [and] houses . . . , against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Mun. Ct. of San Francisco,* 387 U.S. 523, 528 (1967).

Appendix A

Three distinct events occurred that could give rise to a Fourth Amendment violation: (1) the officers' entry into Sargent's home; (2) the officers' conversation with Sargent in his kitchen and the subsequent pursuit; and (3) the use of deadly force to apprehend Sargent. Because different alleged violations of the Fourth Amendment are governed by different analytical frameworks, we analyze each claim individually.

1.

Except in limited circumstances, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara,* 387 U.S. at 528-29. Furthermore, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586 (1980). Thus, if officers enter a home without either a warrant or consent, the government "must overcome the presumption that this entry was unreasonable." *United States v. Rohrig,* 98 F.3d 1506, 1515 (6th Cir. 1996).

Warrantless intrusions into the home, however, are justified in instances of "exigent circumstances." *Id.* Exigent circumstances arise when police are in hot pursuit of a fleeing felon, when the potential destruction of evidence is imminent, when necessary to prevent a suspect's escape, and when a risk of danger is posed to the police or others in the community. *Id.* at 1519. Yet the constitutional benchmark for Fourth Amendment searches and seizures is "reasonableness." Thus this court has extended the exigent circumstances exception, where reasonable, to allow police officers to enter a residence without a warrant in order to locate and abate an ongoing

community nuisance. *Id.* at 1521. In *Rohrig*, we recognized that "the governmental interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighborhood is sufficiently compelling to justify warrantless intrusions *under some circumstances.*" *Id.* at 1522 (emphasis added). Discerning whether and when such circumstances exist involves balancing the claimant's reasonable expectation of privacy at the time of the intrusion with the governmental interest being served by the officers' entry. *See Katz v. United States,* 389 U.S. 347, 351 (1967) (delineating the bounds of one's reasonable expectation of privacy). Undertaking such an examination is unnecessary here, however, because we need not rest our conclusion that Taylor did not commit a Fourth Amendment violation on the exigent circumstances exception, finding as we do that no Fourth Amendment violation occurs when an officer follows a partner inside after the partner has already entered the home. Under those circumstances, the officer's entry is "reasonable."

We disagree with Sargent's argument that Taylor is vicariously liable for all of Whatmore's allegedly illegal actions. Certainly, supervisory officers who order a subordinate officer to violate a person's constitutional rights and non-supervisory officers present during a violation of person's civil rights who fail to stop the violation can be liable under § 1983. *Smith v. Heath,* 691 F.2d 220, 224-25 (6th Cir. 1982). Additionally, the supervising officer can neither encourage the specific act of misconduct nor otherwise directly participate in it. *Poe v. Haydon,* 853 F.2d 418, 429 (6th Cir. 1988). Whether Whatmore committed a Fourth Amendment violation when he entered Sargent's home, Taylor is not vicariously liable for any alleged violation

because there is no indication either that Taylor ordered Whatmore to enter the house illegally or that Taylor knew that Whatmore entered the home without consent. Thus, Taylor never ordered nor participated in a violation of Sargent's rights.

2.

In order to establish a valid Fourth Amendment claim against Taylor for engaging Sargent in conversation and for ordering him not to leave the room, Sargent must first show a seizure. *California v. Hodari D.*, 499 U.S. 621, 626 (1991). *Hodari D.* requires that police either physically touched Sargent to restrain him or otherwise engaged in a show of authority that "in some way restrained [Sargent's] liberty," and that Sargent submitted to such show of authority. *Id.* at 625-26 (quoting *Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968)). The Supreme Court has rejected the possibility that a seizure occurs when an officer commands a fleeing suspect to stop. *Id.* at 626. The facts here fail to establish that Sargent was seized. The fact that Sargent fled is proof that he never submitted to the show of authority. *Id.* at 628. Thus, Sargent was not seized and suffered no Fourth Amendment injury when pursued.[1]

3.

There is no question that Sargent was seized when Taylor shot him in the bedroom. *See Tennessee v. Garner,* 471 U.S.

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1. Additionally, there was no seizure when Officer Taylor drew his weapon and kicked in the closed door to the bedroom in which Sargent was hiding. At the time he kicked in the door, Taylor was in hot pursuit of a fleeing suspect, and exigent circumstances warranted his actions. *See United States v. Morgan,* 743 F.2d 1158, 1162 (6th Cir. 1984).

1, 7 (1985). However, Taylor can be liable under § 1983 only if his seizure of Sargent was objectively unreasonable for employing excessive force. *Ingram v. City of Columbus,* 185 F.3d 579, 596 (6th Cir. 1999). To determine whether excessive force was used, this court must perform a "careful balancing act of the 'nature and intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor,* 490 U.S. 386, 394 (1989) (quoting *Garner,* 471 U.S. at 8).

In this case, the nature of the intrusion was severe. Sargent's "fundamental interest in his own life need not be elaborated upon." *Garner,* 471 U.S. at 9. This intrusion must be weighed against the state's interest. For this balancing, this court should consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ingram,* 185 F.3d at 596 (internal citations omitted). Even viewing all facts in the light most favorable to Sargent, Taylor did not act unreasonably when he used deadly force against Sargent. Sargent was "attempting to evade" Officer Taylor's legitimate demands for identification by flight. He also appeared to be "an immediate threat to the safety of the officers or others." At the moment Taylor kicked in the door to Sargent's bedroom, he observed Sargent quickly turn toward him, gun in hand. Taylor stated that he fired at Sargent because he immediately feared for his own safety. Further, there is no evidence suggesting that Taylor shot Sargent for reasons other than self-defense. *See Garner,* 471 U.S. at 11 (sanctioning the use of deadly force where the officer has probable cause to believe that the suspect poses a threat of

serious physical harm). Therefore, Taylor's action—motivated by the instinct to preserve his own life—sufficiently balances against the admittedly severe intrusion in this case to warrant a finding of reasonableness.

For the reasons given above, none of Taylor's actions constituted Fourth Amendment violations against Sargent. Because Taylor did not violate Sargent's Fourth Amendment rights, it is unnecessary to consider whether he violated any established law. Accordingly, he is afforded qualified immunity and the decision of the district court is affirmed.[2]

B.

The claims against the City of Toledo Police Department fail for a number of reasons. First, police departments are "merely sub-units of the municipalities they serve" and therefore are not proper § 1983 defendants. *Jones v. Marcum,*

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2. Petitioner also asserts a claim against Taylor under Ohio law for wrongful death. Taylor is presumptively entitled to immunity, unless his actions were committed "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b); *see also Fabrey v. McDonald Village Police Dep't,* 639 N.E.2d 31, 35 (1994) (summary judgment appropriate where conduct that was "arguably negligent" does not rise to the level of wanton misconduct). An officer's conduct is wanton if he failed to "exercise any care whatsoever," *Fabrey,* 639 N.E.2d at 35, and the record is void of any evidence that suggests Taylor failed to "exercise any care whatsoever." Because the only evidence suggesting that Taylor acted in a reckless manner was a proposed expert report from a police officer containing conclusory allegations of recklessness, no genuine issue of material fact surrounds the state law claim and summary judgment on the issue is affirmed.

197 F.Supp.2d 991, 997 (S.D.Ohio 2002). Second, a municipality can be liable under § 1983 only if the municipality itself caused the constitutional deprivation, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); it cannot be held liable on the basis of *respondeat superior*. *Id.* The claim against the police department, resting solely on the doctrine of *respondeat superior*, thus fails as a matter of law. Finally, no cognizable *Monell* claim was pled in the complaint, a failure to train claim was pled improperly later in the proceedings. *See Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306-07 (6th Cir. 2000) (determining that plaintiff could not raise a § 1983 claim when only a *Bivens* action was alleged in the amended complaint).

Even if this court agreed to entertain the failure to train argument, it necessarily would fail on the merits. A municipality can be liable for its failure to train police officers if the municipality had a "deliberate indifference of the rights of its inhabitants" and such failure constituted the "moving force behind the constitutional violation." *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir. 1998) (citing *City of Canton v. Harris*, 489 U.S. 378, 379 (1989), and *Monell*, 436 U.S. at 694) (internal quotation marks omitted). Moreover, allegations that "a particular officer was improperly trained are insufficient to prove liability, as are claims that a particular injury could have been avoided with better training." *Id.* (citing *City of Canton*, 489 U.S. at 390-91).

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED AUGUST 11, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:03CV7261

Nicholas Sargent,

Plaintiff,

v.

City of Toledo Police Dep't, *et al.*,

Defendants.

ORDER

This is a civil rights case brought by plaintiff Nicholas Sargent, individually and as the Administrator for the estate of the decedent, Donald Sargent, against the City of Toledo Police Department and one of its officers, Joseph Taylor. Plaintiff's complaint asserts claims under the Fourth, Fifth, Eighth, and Fourteenth Amendments. This court has jurisdiction pursuant to 28 U.S.C. § 1331.

Pending are defendants' motions for summary judgment. For the following reasons, defendants' motions shall be granted.

Appendix B

BACKGROUND

Early in the morning of April 20, 2002, Toledo police officers Joseph Taylor and Douglas Whatmore were dispatched to 3904 Leyborn, in response to a 911 call from a neighboring home reporting a noise disturbance. On arriving at the residence, the officers inspected the property, finding juveniles sitting on the front porch and a young person "passed out" in the rear seat of a car parked in the driveway. (Doc. 25 at 10). Officer Whatmore then heard and saw a number of juveniles running from the rear of residence.

Approaching the open back door, Whatmore "peeked" his head inside and saw the decedent, Donald Sargent. (Doc. 25 at 12-13). Whatmore asked Sargent, "What's going on?", and then stepped inside the door and attempted to learn Sargent's identity. (Doc. 25 at 12- 14). At that point, Officer Taylor came to the back of the house. Seeing Whatrnore inside, Taylor entered the residence.

Whatmore believed that Sargent was behaving strangely, and may have been intoxicated. The coroner's report later showed that his blood alcohol level was 0.19% and that he had recent exposure to cannabis. The officers asked Sargent for his identification, to which he replied that he would go upstairs to retrieve it. Taylor responded, "Don't worry about it." (Doc. 26 at 18).

Sargent then ran from the officers. While the officers pursued him, Whatmore was slowed down in the living room, which left him behind Taylor. Taylor asserts that he yelled for Sargent to stop, and when he did not, chased him up the

stairs. Sargent then ran into a room occupied by three other people, and slammed the door behind him.

After entering the room, Sargent went to a mattress in the room, lifted it, and pulled a loaded .22 caliber pistol from his right pocket. Sargent apparently had the pistol when the officers encountered him downstairs, and thus probably was trying to place it under the mattress.

As Sargent was holding the weapon, Taylor, with his gun in his hand, kicked in the door. Sargent, approximately three feet from Officer Taylor, turned toward the officer with the gun in his hand pointed toward the floor. Taylor shouted to Sargent to drop the gun. Instead of doing so, Sargent shouted something back. Taylor fired a single shot, which entered Sargent's chest and caused his death.

STANDARD OF REVIEW

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Cattrett,* 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324.

In deciding the motion for summary judgment, the evidence of the non-moving party will be believed as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn in the non-moving party's favor. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). Summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c).

DISCUSSION

Plaintiff asserts a Fourth Amendment claim under 42 U.S.C. § 1983. To make a claim under § 1983, plaintiff must show a deprivation of a federal right by an individual acting under color of law. *See Collins v. City of Harker Heights*, 503 U.S. 115, 120-21 (1992). Plaintiff asserts that defendants, acting under color of law, violated Sargent's

constitutional right against unreasonable search and seizure guaranteed by the Fourth Amendment.[1]

A. Defendant "City of Toledo Police Department"

Plaintiff asserts claims against the Police Department under *respondeat superior*, 42 U.S.C. § 1983, and Ohio Revised Code § 2125. A police department, however, is not a legal entity capable of being sued. *See Papp v. Snyder*, 81 F. Supp. 2d 852, 857 (N.D. Ohio 2002); *Jones v. Marcum*, 197 F. Supp. 2d 991, 997 (S.D. Ohio 2002). Accordingly, the motion for summary judgment can be granted on that ground alone. Even if the City of Toledo were properly named as the defendant, however, the motion should be granted on the merits.

1. Federal Claims

Municipalities are not wholly excluded from liability for § 1983 violations of constitutional rights. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690 (1978). A local government, however,

> may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or

1. Plaintiff's response to the defendants' motions for summary judgment does not address the defendants' arguments relating to plaintiff's Sixth, Eighth, and Fourteenth Amendment claims. Consequently, because the plaintiff has not complied with the requirement of Fed. R. Civ. P. 56(e), the defendants are entitled to summary judgment as to those claims.

> custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694.

To impose liability on a municipality for the unconstitutional acts of its employees, a plaintiff must prove: 1) a constitutional violation has occurred; and 2) the violation resulted from a specific governmental policy or custom. *Id.* Plaintiffs complaint, invoking *respondeat superior*, fails to establish municipal liability. Alleging that Taylor was an employee of the Police Department and/or that he was acting within the scope of employment does not meet the requirements set out in *Monell.* Assuming that Taylor's shooting of Sargent was a constitutional violation, plaintiff has not established that this unconstitutional act furthered a specific governmental policy of the Toledo Police Department. Therefore, municipal liability does not attach.

Plaintiffs "failure to train" claim is insufficient at this late stage in the pleading. Even if properly plead, however, it is without support. To establish this claim, plaintiff must show: 1) either no training was given, or the training provided was inadequate; 2) it was the municipality's "conscious decision" not to provide training; and 3) the municipality's failure to provide training was the "moving force" behind the constitutional violation. *Id.*; *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir. 1998). A plaintiff can establish liability "only where a municipality's failure to train its

employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

In this case, Taylor has been with the Toledo Police Department since 1994 after graduating from the Toledo Police Academy, where he received firearms training. Plaintiff has failed to show lack of training, and even if the training was inadequate, plaintiff has not shown "deliberate indifference" on the part of the City of Toledo. Therefore, defendant City of Toledo Police Department's motion for summary judgment as to the federal claims against it shall be granted.

2. State Law Claims

Plaintiff asserts a state-law wrongful death claim under Ohio Revised Code § 2125 against City of Toledo Police Department. A claim against a department of a political subdivision is essentially a claim against the political subdivision itself. *Wilson v. Stark City Dept. Of Human Serv.*, 70 Ohio St. 3d 450, 453 (1994). Consequently, where the political subdivision enjoys immunity, the department does as well. *Id.*

O.R.C. § 2744.02(A)(1) establishes sovereign immunity for political subdivisions. The provision more specifically states that a political subdivision is not liable for "injury, death, or loss to persons or property by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Among the governmental functions listed in O.R.C. § 27744.01 for which immunity exists is "a provision

or non-provision of police, fire, emergency medical, ambulance, and rescue services or protection."

As a department of a political subdivision, the Toledo Police Department enjoys the immunity set forth in O.R.C. § 2744.02. None of the exceptions to immunity listed in O.R.C. § 2744.02(B)(1-5) applies. Plaintiff's complaint fails to allege sufficient grounds to overcome the City's claim of statutory immunity under Ohio law. Therefore, defendant City of Toledo Police Department's motion for summary judgment as to the state law claims shall be granted.

B. Defendant Joseph Taylor

Plaintiff asserts that Officer Taylor violated his Fourth Amendment rights against unreasonable search and seizure. Plaintiff also asserts a state law wrongful death claim against Taylor.

1. Federal Claims

Fourth Amendment claims are to be analyzed in a segmented manner, in his case by examining each of defendant Taylor's acts, from entry to fatal shooting, for their Fourth Amendment implications. *See Claybrook v. Birchwell*, 274 F.3d 1098, 1104-05 (6th Cir. 2001); *Whitlow v. City of Louisville*, 39 Fed. Appx. 297, 304 (6th Cir. 2002). Thus, I will analyze each ofthe Fourth Amendment "events" in the instant case in order of their occurrence.

Appendix B

a. Entry of 3904 Leyborn

The Sixth Circuit has held that the "governmental interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighborhood is sufficiently compelling to justify warrant-less intrusions under some circumstances." *United States v. Rohrig*, 98 F.3d 1506, 1522 (6th Cir. 1996). The officers in *Rohrig*, responding to a disturbance call, could hear noise within the home and entered through a closed but unlocked back screen door when a knock on the front door received no response. *Id.* at 1509.

The officers in the instant case were responding to an emergency call concerning just such a noise nuisance. The loud, late night party contravened the Toledo Municipal code; the officers could try to learn the source of the noise and to quiet it.

Whatmore had further justification for investigating the circumstances when he saw fleeing juveniles and someone "passed out" in a car in the driveway. When Whatmore approached the open back door, he was making a reasonable attempt to ascertain the nature of the circumstances.

The purpose of Whatmore's entry was to learn who was responsible for the nuisance and to end it. After knocking, and neither receiving a response nor hearing the noise abate, the officers could lawfully enter under the "community peacekeeping" rationale of *Rohrig*.

Furthermore, Taylor entered 3904 Leyborn only *after* seeing his partner Whatmore inside the residence. Once Whatmore was inside the residence, Taylor could enter lawfully. *See United States v. Jeffries*, 823 F. Supp 437, 440 (E.D. Mich. 1993).

b. Taylor's pursuit of Sargent

There was no "seizure" of Sargent during the initial conversation inside the residence, nor did any occur during Sargent's flight and Taylor's pursuit. Pursuit of a fleeing subject is not a seizure of that subject. *California v. Hodari D.*, 499 U.S. 621, 626-627 (1991). A "seizure" does not occur if the subject does not yield. *Id.* at 626. Thus, no Fourth Amendment issues arose as Officer Taylor was chasing Sargent upstairs.

c. Taylor's entry into the upstairs room

While a police officer is usually "prohibited from entering a residence to effectuate a warrantless arrest, . . . an officer is justified in so acting if there are exigent circumstances presented by the facts of the individual case." *Jones v. Lewis*, 874 F.2d 1125, 1130 (6th Cir. 1989). The Sixth Circuit has identified three instances in which exigent circumstances are found: 1) when the officers were in hot pursuit of a fleeing suspect; 2) when the suspect represented an immediate threat to the arresting officers or the public; and 3) when immediate police action was necessary to prevent the destruction of vital evidence or thwart the escape of known criminals. *United States v. Morgan*, 743 F.2d 1158, 1162-63 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985).

Appendix B

An "exigent circumstance" is a situation in which "the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978). The time to determine the existence of an exigency is "the moment of the warrantless entry by the officers." *United States v. Killebrew*, 560 F.2d 729, 733 (6th Cir. 1977).

At the time Taylor entered the upstairs room, he was in "hot pursuit" of Sargent, a fleeing suspect who had appeared intoxicated and had behaved strangely. By running from the officers, Sargent created an exigency that necessitated Taylor's immediate action. Because Sargent was behaving erratically prior to his flight, Taylor's decision to chase Sargent was reasonable under the circumstances and should not be second-guessed with the benefit of cool hindsight.

Taylor's warrantless entry into the upstairs room was lawful because Sargent's flight, when viewed together with his erratic behavior and unexplained reluctance to identify himself to the officers, created an exigent circumstance that led to the need for immediate action. Taylor could reasonably have believed that Sargent fled with the intention to harm the officers or others or to destroy evidence of a crime. *See Morgan*, 743 F.2d at 1162-63. Thus, Taylor's entry into the upstairs bedroom did not violate the Fourth Amendment.

Appendix B

d. Taylor's shooting of Sargent

Apprehension of a subject through the use of deadly force is a "seizure" subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The reasonableness of the force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Conner*, 490 U.S. 386, 396 (1989). When a suspect threatens an officer with a weapon, or that officer reasonably believes the suspect is a threat to his safety or that of others, deadly force is not unconstitutional. *Garner*, 471 U.S. at 11.

Taylor was pursuing a subject who had been uncooperative and appeared intoxicated, had fled from him, was encountered holding a gun, and failed to comply with a command to drop the weapon. It may have reasonably appeared to Taylor that Sargent had armed himself after entering the room, as Sargent was lifting the mattress as Taylor entered.

In *Graham*, the Court stated that a factor to be considered in excessive force cases is "whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 395. This situation and Taylor's response to it was precisely the "split-second judgment - in circumstances that are tense, uncertain, and rapidly evolving," that requires consideration from the officer's perspective. *Id.* at 397.

It was reasonable for Taylor to have apprehended that his life was in immediate danger when he shot Sargent. Therefore, defendant Taylor's motion for summary judgment with respect to the federal claims shall be granted.[2]

2. State Law Claims

Plaintiff asserts a wrongful death claim against defendant Taylor pursuant to O.R.C. § 2125.02. Whether an individual employee is entitled to immunity is a question of law. *Conley v. Shearer*, 64 Ohio St. 3d 284, 292 (1992). By its terms, O.R.C. § 2744.03(A)(6) operates as a presumption of immunity. *Cook v. Cincinnati*, 103 Ohio App. 3d 80, 90 (1995). Consequently, liability only attaches when the employee's acts were 1) manifestly outside the scope of the employee's employment or official responsibilities, or 2) with malicious purpose, in bad faith, or in a wanton and reckless manner. O.R.C. § 2744.03(A)(6).

---

2. Taylor also argues that he is entitled to qualified immunity, and I agree. The factors plaintiff must prove to defeat this claim are 1) whether the facts alleged, taken in the light most favorable to the party asserting the injury, establish that the officer's conduct violated a constitutional right and, if so, 2) whether that right was clearly established at the time that the injury occurred. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Plaintiff has failed to show a constitutional violation, and even if he could, he has failed to show that any right protecting him against Taylor's actions was clearly established such that Taylor should have known that he was acting unreasonably when he pursued, and ultimately shot, Sargent. *See id.* at 202 (court must find that the officers' actions were unreasonable in light of the specific circumstances of the situation and the facts of which they were aware at the time of the arrest).

Appendix B

The Supreme Court of Ohio has set a very high standard for a showing of wanton misconduct: the failure to exercise any care whatsoever. *Hawkins v. Ivy*, 50 Ohio St. 2d 114 (1977); *Fabrey v. McDonald Village Police Dept.*, 639 N.E.2d 31 (Ohio 1994) (while the finding of wanton misconduct is normally a jury question, summary judgment is appropriate where conduct that was "arguably negligent" did not rise to the level of wanton misconduct).

Plaintiff submits a proposed expert report from a police officer in support of his assertion that Taylor's actions were reckless. Even if I assume that plaintiffs expert report is admissible, it does not establish that Taylor's conduct reached the level of recklessness. Its conclusory allegations of recklessness are insufficient to permit this case to go to the jury.

Taylor exercised some level of care: he shouted at Sargent to drop the gun. Plaintiff has not produced evidence sufficient to show that Taylor's conduct was within the exceptions contained in O.R.C. § 2744.03(A)(6). Therefore, defendant Taylor's motion for summary judgment with respect to the state law claims shall be granted.

Appendix B

CONCLUSION

In light of the forgoing, it is

ORDERED THAT defendants City of Toledo Police Department and Joseph Taylor's motions for summary judgment be, and hereby are, granted.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge
August 11, 2004

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 7, 2006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-4143

NICHOLAS SARGENT, INDIVIDUALLY AND AS ADMINISTRATOR FOR THE ESTATE OF DONALD J. SARGENT,

Plaintiff-Appellant,

v.

CITY OF TOLEDO POLICE DEPARTMENT, and JOSEPH TAYLOR, CITY OF TOLEDO POLICE DEPARTMENT,

Defendants-Appellees.

ORDER

BEFORE: SILER and DAUGHTREY, Circuit Judges; and MARBLEY,* District Judge.

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* Hon. Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Appendix C

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
OCT 27 2006
OFFICE OF THE CLERK

No. 05-1442

IN THE

Supreme Court of the United States

NICHOLAS SARGENT, etc., *et al.*,

Petitioners,

v.

CITY OF TOLEDO POLICE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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QUESTIONS PRESENTED

I. May police officers enter a home where a loud party is in progress where no other indication of exigent circumstances is present, and without exercising the opportunity to seek consent of any resident of the home?

II. Is an officer's entry into a home *per se* "reasonable" under the Fourth Amendment for the sole reason that another officer is already inside that home?

III. Does a party complaining of a deprivation of rights under 42 U.S.C. § 1983 also have independent rights under the laws of his own state?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Argument in Support of Rehearing 1

I. This Court Has Twice Recently Emphasized That The Police Must Give Citizens In Their Own Homes The Opportunity To Comply With Police Orders. 2

II. This Court Has Recently Emphasized The Crucial Role Of Civil Remedies For Knock And Announce Violations As A Deterrent To Police Misconduct. 5

III. This Court Should Accept Jurisdiction To Clarify That State Law Provides An Independent Basis For Deciding Police Excessive Force Claims. 8

Conclusion 9

TABLE OF CITED AUTHORITIES

Page

Cases:

Brigham City v. Stuart, 126 S. Ct. 1943 (2006) ... 3, 4, 9

Hudson v. Michigan, 126 S. Ct. 2159 (2006) .... *passim*

State v. Farris, 109 Ohio St.3d 519 (2006) 9

United States Constitution:

Fourth Amendment ..... i, 3

Statute:

42 U.S.C. § 1983 ..... i, 7

Rule:

S. Ct. R. 44(2) 1

ARGUMENT IN SUPPORT OF REHEARING

Now comes the Petitioner, Nicholas Sargent, individually and in his capacity as the representative of Mr. Donald Sargent, deceased, and hereby requests that this Court rehear its decision of October 2, 2006, denying the Petition for a Writ of Certiorari. This request is made under S. Ct. R. 44(2).

Briefly restated, this case concerns the shooting death of Donald Sargent at the hands of an officer of the Toledo, Ohio, police department. The shooting occurred within 30 seconds of the officer's warrantless entry into the Decedent's home. The officers were at that time responding only to a noise disturbance call. They admitted on the record that they did not suspect any felony was in progress, that any violent or dangerous activities were occurring, nor that any evidence of any crime was about to be destroyed. The first officer merely walked into the Decedent's home without even trying to obtain consent, notwithstanding the admitted fact that the Decedent was standing directly in front of the officer. When the Decedent fled, the officers chased him into his room. While the Decedent was attempting to stow a gun, Respondent Taylor burst through his bedroom door, and fired the shot that killed Donald Sargent. Neither officer realized the Decedent had been carrying a gun until the moment the shot was fired. Donald Sargent was chased to his death because he fled an unlawful police entry into his home.

I. This Court Has Twice Recently Emphasized That The Police Must Give Citizens In Their Own Homes The Opportunity To Comply With Police Orders.

Even since the Petition for Certiorari was filed in this case, this Court issued a new pronouncement highlighting the necessity of the opportunity to comply with a police command issued to a citizen within his own home. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006). This Court stated:

> Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U.S. Const., Amdt. 4, from the government's scrutiny. ***
>
> (1F) One of those interests is the protection of human life and limb, **because an unannounced entry may provoke violence in supposed self-defense by the surprised resident**. *See, e.g., McDonald v. United States*, 335 U.S. 451, 460-461, 69 S. Ct. 191, 93 L. Ed. 153 (1948) (Jackson, J., concurring). *See also Sabbath*, 391 U.S., at 589, 88 S. Ct. 1755, 20 L. Ed. 2d 828; *Miller*, 357 U.S., at 313, n. 12, 78 S. Ct. 1190, 2 L. Ed. 2d 1332. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, **if he had notice, it is to be presumed that he would obey it**. . . .'" *Wilson*, 514 U.S., at 931-932, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (quoting Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195-196 (K. B. 1603)). **The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid**

> **the destruction of property occasioned by a forcible entry."** *Richards*, 520 U.S., at 393, n. 5, 117 S. Ct. 1416, 137 L. Ed. 2d 615. See also *Banks*, 540 U.S., at 41, 124 S. Ct. 521, 157 L. Ed. 2d 343. **And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police.** *Richards*, 520 U.S., at 393, n. 5, 117 S. Ct. 1416, 137 L. Ed. 2d 615. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Ibid.* **In other words, it assures the opportunity to collect oneself before answering the door.** [Emphasis added.]

Hudson, 126 S. Ct. at 2165 (2006). The Respondent's entry in this case was a patent violation of the Fourth Amendment interests this Court has repeatedly upheld as the "chief evil" against which its protections are directed. While the Petitioner did not frame the issue in terms of the failure to "knock and announce" within the Petition for Certiorari, the importance of that rule and of the opportunity to comply was extensively briefed in the Sixth Circuit Court of Appeals. Thus, the issue is on the record, and this Court's recent acknowledgment of the importance of the opportunity to comply with police business at the home cannot be denied.

The importance of this issue is highlighted by the fact that this Court also just decided a second case involving a very closely related examination of a warrantless entry. In *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006), this Court took care to detail that a warrantless entry made to stop a

fight in progress was constitutional, so long as an *attempt* was made at getting the attention of the persons inside the house:

> Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

Brigham City v. Stuart, 126 S. Ct. 1943, 1949 (2006). This case now stands contrary to *Stuart* because it is undisputed that neither officer made *any* attempt to get the attention of persons inside the home, or gain the cooperation of the Decedent.

This Court's words in *Hudson* are vividly illustrated by the record before this Court. Indeed, the Respondent's entry did provoke a reaction, albeit a less violent action than even typically associated with self defense. Donald Sargent violated no law whatsoever by fleeing, but paid for this lawful prerogative with his life. The "opportunity to comply" is more than a matter of courtesy. In this case, as it is "presumed that he would obey" a lawful notice of the intentions of the Respondent, a knock or announcement of the Respondent's purpose would have saved a life.

II. This Court Has Recently Emphasized The Crucial Role Of Civil Remedies For Knock And Announce Violations As A Deterrent To Police Misconduct.

Also in *Hudson*, this Court emphasized that civil litigation is an effective deterrent for violations of the knock and announce rule. However, this case still stands as a repudiation of that very notion. This Court stated:

> (1I) It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly "undeterred." When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted [*2167] search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only "effective deterrent"? And what, other than civil suit, is the "effective deterrent" of police violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes—and yet nothing but "ineffective" civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

*** Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; ***. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities, [cite omitted]. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," Tr. of Oral Arg. 7, **but 42 U.S.C. § 1988(b) answers this objection**. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after Mapp, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." M. Avery, D. Rudovsky, & K. Blum, Police Misconduct: Law and Litigation, p v (3d ed. 2005); see generally N. Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond (1989) (describing the growth of public-interest law). The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

> *** **As far as we know**, civil liability is an [*2168] effective deterrent here, as we have assumed it is in other contexts. *See, e.g., Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) ("[T]he threat of litigation and liability will adequately deter federal officers for Bivens purposes no matter that they may enjoy qualified immunity" (as violators of knock-and-announce do not)); *see also Nix v. Williams*, 467 U.S. 431, 446, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

Hudson, 126 S. Ct. at 2167-2168 (2006). This Court thus put a great deal of faith into civil litigation as an effective deterrent to violations of the knock and announce rule. The civil remedy of 42 U.S.C. § 1983 cannot "answer the objection" that knock and announce violations are too easily dismissed when a the lower courts can so easily devalue the opportunity to comply with police commands.

This Court's reliance on civil litigation to deter violations of the knock and announce rule is inscrutable in theory. In practice, however, this case illustrates the dangerous potential for that remedy to provide nothing to an aggrieved citizen, even when the warrant requirement was clearly disregarded and no opportunity was made to obtain consent. Unless this Court accepts jurisdiction, this case will militate against civil litigation deterring police misconduct.

III. This Court Should Accept Jurisdiction To Clarify That State Law Provides An Independent Basis For Deciding Police Excessive Force Claims.

The law of the State of Ohio received no more consideration than a single footnote in this case. Petitioner has previously argued that for a federal court of appeals to dismiss all state law claims with a single footnote is to do harm to the federalist structure of our laws. Since the Petition was filed, Justice Stevens has observed that, in addition, the adjudication of search and seizure cases on state law grounds can decrease federal litigation:

> The Utah Supreme Court, however, has made clear that the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment. See *State v. Debooy*, 2000 UT 32, P12, 996 P.2d 546, 549. And it complained in this case of respondents' failure to raise or adequately brief a state constitutional challenge, thus preventing the state courts from deciding the case on anything other than Fourth Amendment grounds. See 2005 UT 13, P12, 122 P. 3d 506, 510. "[S]urpris[ed]" by "[t]he reluctance of litigants to take up and develop a state constitutional analysis," *ibid.*, the court expressly invited future litigants to bring challenges under the Utah Constitution to enable it to fulfill its "responsibility as guardians of the individual liberty of our citizens" and "undertak[e] a principled exploration of the interplay between federal and state protections of individual rights," *id.*, at 511. The fact that this admonishment and request came from the Utah Supreme Court in this very case not only demonstrates that the prosecution selected the wrong case for establishing the rule it wants, but indicates that the Utah Supreme Court would probably adopt

> the same rule as a matter of state constitutional law that we reject today under the Federal Constitution.
>
> Whether or not that forecast is accurate, I can see no reason for this Court to cause the Utah courts to redecide the question as a matter of state law. Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.

Stuart, 126 S. Ct. at 1950 (2006)(Stevens, J., concurring). Similarly, even since the Petition was filed, the Ohio Supreme Court has re-affirmed that Ohio law provides greater search and seizure safeguards than federal law. *State v. Farris*, 109 Ohio St.3d 519, ¶¶ 46-48 (2006)(re-stating that Ohio's Constitution provides greater protection against warrantless search and seizure than the U.S. Constitution).

The District Court and the Circuit Court of Appeals caused Ohio's state law to vanish in this case. This case was properly pled in *state* court under both federal and *state* law standards. While removal was proper, the subsequent devaluation of state law was certainly not. Moreover, as observed by Justice Stevens, adequate consideration of state law has the potential to reduce the number of claims prosecuted through the federal appellate system because the courts need not disturb a judgment decided on state law grounds.

CONCLUSION

Petitioners urge rehearing of this Court's denial of jurisdiction over this appeal, for three main reasons. First, even since the Petition was filed, this Court has twice reaffirmed the importance of the "knock and announce" rule. In this case, adherence to that rule would likely have saved a life. Second,

in *Michigan v. Hudson*, this Court just underscored the importance of civil litigation as a deterrent to police misconduct. This case still stands in contravention to that aspect of this Court's holding. Finally, Justice Stevens has rightly observed that when the courts and litigants properly consider state law, the need to determine cases based on federal law is decreased.

This case presents a gross injustice that only this Court can address. Further, this case presents numerous questions regarding the warrantless entry into the home, questions of such importance that this Court has recently issued no fewer than three opinions discussing closely related issues. This Court should accept jurisdiction in order to provide guidance to future police actors and citizens alike, as well as to ensure a meaningful remedy for the family of Donald Sargent.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

Martin S. Delahunty III